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No. 83-1450

In the Supreme Court of the United States

OCTOBER TERM, 1983

KENNETH R. CUNNINGHAM, ET AL., PETITIONERS

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether fiduciaries of an employee stock ownership plan (ESOP) breached the requirement of prudence imposed on all fiduciaries under Section 404 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1104, by failing to take into account, in making a purchase of qualifying employer securities, the poor financial performance of the company and the effect of the ESOP itself on the value of the company's stock.

2. Whether ESOP fiduciaries, in purchasing qualifying employer securities from a party-in-interest, satisfied the requirement to pay no more than "adequate consideration" for such securities, within the meaning of Section 408 of ERISA, 29 U.S.C. 1108, when the fiduciaries failed to act in accordance with the prudence requirements of Section 404 of ERISA.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 716 F.2d 1455. The opinion of the district court (Pet. App. 47a-78a) is reported at 541 F. Supp. 276.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1983. A petition for rehearing was denied on December 2, 1983 (Pet. App. 43a-44a). The petition for a writ of certiorari was filed on February 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Metropolitan Contract Services, Inc. (MCS) is a contract trucking company. Petitioner Cunningham was chairman of the board, chief executive officer, and president of MCS; until the stock transactions involved in this case, he was also the sole shareholder of MCS. Petitioners

Esparza, Fritcher, Hairell, and Robertson were members of MCS's board of directors. Pet. App. 5a. On December 15, 1975, MCS's board of directors voted to establish an employee stock ownership plan (ESOP), effective July 1, 1975, for employees of MCS (*id.* at 4a). The plan was to be funded by company contributions, which were to be invested primarily in MCS stock.[1]

In August 1976, the members of the MCS board of directors appointed themselves as the ESOP Administrative Committee, thus becoming fiduciaries within the meaning of Section 3(21)(A) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1002(21)(A). At all times relevant to this case, the MCS directors simultaneously served as members of the MCS ESOP committee. Pet. App. 4a. On August 6, 1976, the MCS board of directors voted to contribute $288,000 in cash to the ESOP for the purpose of enabling the ESOP to purchase 1,440 shares of MCS stock from Cunningham, the sole shareholder of the company. These same individuals then participated, as ESOP fiduciaries, in the decision to purchase those shares from Cunningham at $200 per share. Pet. App. 5a.

On February 18, 1977, Cunningham sold an additional 5,000 shares of MCS stock to the MCS ESOP, again at $200 per share, for a total price of $1 million. As with the earlier ESOP purchase, petitioners, acting as the MCS board of directors, approved the funds for the transaction and, acting as ESOP fiduciaries, made the actual decision to purchase. After the sale, the ESOP owned a total of 6,440

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[1]An ESOP is a form of pension plan covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, intended to provide retirement income to its participants by investing primarily in securities issued by the company sponsoring the plan.

shares of MCS stock, or roughly 34% of the outstanding shares. Pet. App. 6a.[2]

The fiduciaries' determination to pay $200 per share rested on an appraisal performed by the investment banking firm of Rotan Mosle, Inc. MCS had commissioned Rotan Mosle to appraise the fair market value as of June 30, 1975 of the 100% block of MCS stock then owned by Cunningham. Rotan Mosle estimated the fair market value of that 100% block at $2,020,000, or $200 per share, based on the 10,100 shares then outstanding. Pet. App. 55a-56a. The appraisal, which was issued in November 1975, was premised, in large part, on MCS management's projection, as of June 30, 1975, that the company's revenues would increase from $4.2 million received in the fiscal year ending June 30, 1975, to $6.5 million for the fiscal year ending June 30, 1976 (*id.* at 27a). In fact, MCS's revenues as of July 1976 were only $4.1 million, and as of the close of the fiscal year ending June 30, 1977, MCS's revenues totalled $5.6 million (*ibid.*).

In addition, unlike the situation as of June 1975, by February 1977, MCS was obligated to make contributions on a continuing basis to the ESOP. This expense arose in part from the fact that the second ESOP transaction was financed through a $1 million loan to the ESOP from Allied Bank of Texas and, pursuant to the loan documents, MCS was required to make sufficient contributions to the ESOP to enable the ESOP to pay back the loan (Pet. App. 6a).[3]

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[2]In January 1977, MCS issued 9,000 new shares of stock as part of a transaction in which MCS acquired all the stock of Metro Contract Services, Inc., another Cunningham company, in exchange for the MCS stock. At the time of the second ESOP transaction, therefore, there was a total of 19,100 shares of MCS stock, of which Cunningham owned 12,660 and the ESOP 6,440. Pet. App. 6a n.4.

[3]In performing its appraisal, Rotan Mosle did not consider the reduction in earnings caused by ESOP contributions because as of June 30, 1975, the ESOP did not even exist; thus, the possibility of future contributions was, at that time, purely hypothetical (Pet. App. 31a-32a & n.33).

Because of the failure of MCS to achieve projected earnings, and because of the additional expense arising from the ESOP contributions, the net income of MCS actually dropped from $226,000 as of June 30, 1975, to $43,000 as of June 30, 1976, and to $53,000 as of June 30, 1977 (*id.* at 29a n.30).

2. The Secretary of Labor filed this action on January 14, 1980, in the United States District Court for the Southern District of Texas, pursuant to his authority under ERISA. In his complaint, the Secretary alleged that petitioners, as fiduciaries of the ESOP, breached their duties under ERISA in connection with the two purchases by the ESOP of the MCS stock by causing the ESOP to purchase the stock from petitioner Cunningham, the sole shareholder of MCS, at inflated prices, resulting in substantial losses to the plan and great personal gain to Cunningham. This conduct, the Secretary contended, violated Section 404(a) of ERISA, 29 U.S.C. 1104(a), which requires plan fiduciaries to act prudently and solely in the interest of the plan, and Sections 406(a) and 408(e), 29 U.S.C. 1106(a) and 1108(e), which prohibit plan fiduciaries from purchasing employer securities from persons with "inside" relationships to the plan (such as petitioner Cunningham) except for "adequate consideration." "Adequate consideration" is defined in Section 3(18)(B) of the Act, 29 U.S.C. 1002(18)(B), as "the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary."

Following a bench trial, the district court dismissed the Secretary's claims and entered judgment for petitioners. The court based its decision on a finding that petitioners acted in good faith in projecting greater revenues for MCS and in relying on the Rotan Mosle appraisal, which, in the court's view, remained a reasonable approximation of the

value of the stock transferred to the ESOP in August 1976 and February 1977. Pet. App. 47a-78a. Based on its conclusion that petitioners had not caused the ESOP to pay any more than "adequate consideration" for the MCS stock, the district court also concluded that petitioners were not guilty of any breach of their fiduciary duties under Section 404. Pet. App. 67a.

3. The court of appeals reversed, holding that petitioners' failure to conduct investigations sufficient to determine whether the Rotan Mosle appraisal remained a reasonable approximation of fair market value at the time of the stock purchases constituted a breach of their fiduciary duties under ERISA. In particular, petitioners' failure to take into account MCS's poor financial performance since the time of the Rotan Mosle appraisal and the effect of creation of the ESOP itself on MCS's financial condition evidenced lack of prudence as required by Section 404 of ERISA. Pet. App. 24a-39a. The court of appeals further held that "the ESOP transactions also were prohibited by Section 406" because the fiduciaries, by failing to give appropriate consideration to these factors, "likewise [could] not establish that they paid adequate consideration" for the MCS stock (*id.* at 39a).

ARGUMENT

This case involves the interplay of four sections of ERISA. Section 404 of ERISA, 29 U.S.C. 1104, imposes on fiduciaries a general duty to act with the "care, skill, prudence, and diligence * * * that a prudent man * * * would use." Section 406 of ERISA, 29 U.S.C. 1106, prohibits transactions between an ERISA-covered plan and a party-in-interest, but Section 408(e)(1), 29 U.S.C. 1108(e)(1), provides an exemption from Section 406 for the acquisition by a plan of qualifying employer securities "if such acquisition * * * is for adequate consideration * * *." Section 3(18)(B) of ERISA, 29 U.S.C. 1002(18)(B), provides that "adequate

consideration" for a security as to which there is no generally recognized market is the "fair market value of the asset as determined in good faith by the trustee or named fiduciary * * *." As we demonstrate below, the court of appeals' decision represents a logical and reasonable interpretation of these statutory provisions based on settled legal principles. It is correct, consistent with the purposes of ERISA, and does not conflict with any decision of this Court or any other court. Further review by this Court is unwarranted.

1. Petitioners' principal contention is that the court of appeals erred in considering their "prudence" in investigating all the factors that might affect the stock's value to determine whether they paid "adequate consideration," within the meaning of Section 3(18)(B), so as to qualify for a Section 408 exemption from the transactions prohibited by Section 406. In petitioners' view, the focus of the court's Section 406 inquiry should have been limited to "whether adequate consideration was paid," and should not have encompassed "the conduct of the fiduciaries in investigating the value of the stock to be purchased" (Pet. 10). Stated differently, petitioners contend that Sections 404 and 406 are wholly unrelated and that the court of appeals erred in looking to the same factors to assess petitioners' liability under the two sections.

While we submit that petitioners' efforts to compartmentalize the various sections of ERISA are erroneous (see pages 8-10, 14, *infra*), the more important consideration for this Court is that petitioners' arguments carry no legal consequences for the outcome of this case. As petitioners themselves concede, "their general conduct is still governed by Section 404" (Pet. 14), regardless of their liability under Section 406.[4] The court of appeals concluded that they in

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[4]Section 404 has been described as embodying the "central and fundamental obligation imposed on fiduciaries by ERISA." *Eaves* v. *Penn*, 587 F.2d 453, 457 (10th Cir. 1978). The duties of a trustee are "the highest known to the law." *Donovan* v. *Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir.), cert. denied, 459 U.S. 1069 (1982).

fact breached their duties of prudence under Section 404, independent of their duties under Section 406 (Pet. App. 39a). It is established law that the affirmative statutory duty to act prudently "subsumes the duty 'to make an independent inquiry into the merits of a particular investment' decision." *Donovan* v. *Bierwirth*, 538 F. Supp. 463, 470 (E.D.N.Y. 1981), modified on other grounds, 680 F.2d 263 (2d Cir.), cert. denied, 459 U.S. 1069 (1982) (citation omitted). When faced with an unusual or difficult investment decision, such as the valuation of closely-held stock, it is not enough for trustees to rely wholly upon the advice of others or the representations of a self-interested party; they are charged with making an independent investigation. *Katsaros* v. *Cody*, 568 F. Supp. 360, 367 (E.D.N.Y. 1983), appeal pending, No. 83-6325 (2d Cir.). Furthermore, "a belief, even a good faith belief, held by the trustees does not insulate them from charges that they have acted imprudently," *Donovan* v. *Bierwirth*, 538 F. Supp. at 470, for the measure of prudence under the Act is an objective one. See *Donovan* v. *Bierwirth*, 680 F.2d at 271; *Eaves* v. *Penn*, 587 F.2d 453, 457 (10th Cir. 1978). See also *Donovan* v. *Mazzola*, 716 F.2d 1226, 1232 (9th Cir. 1983), cert. denied, No. 83-598 (Jan. 9, 1984) (court to consider whether "trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment"); *Davidson* v. *Cook*, 567 F. Supp. 225, 236-237 (E.D. Va. 1983), aff'd, No. 83-1706 (4th Cir. Apr. 11, 1984); *Marshall* v. *Glass/Metal Ass'n*, 507 F. Supp. 378, 384-385 (D. Haw. 1980). The court of appeals' finding of a Section 404 violation for failure to investigate in the manner expected of prudent fiduciaries thus follows well-established ERISA jurisprudence, and it does not warrant review by this Court.

2. Although petitioners' violation of Section 404 alone justifies the court of appeals' reversal of the district court's dismissal of the Secretary's complaint, petitioners nevertheless urge this Court to decide whether the finding of imprudence is, as the court of appeals held, dispositive of the

related determination whether petitioners come within the terms of the Section 408 exception to the Section 406 prohibitions. Petitioners' quarrel with the court of appeals' resolution of this aspect of the case is without merit.

The crux of the issue is the meaning of "good faith" as that phrase is used in Section 3(18)(B)'s definition of "adequate consideration." Petitioners contend (Pet. 14) that "the reference to 'good faith' in Section 3(18)(B) was not intended to incorporate the prudent man rule but was intended to be utilized as a defense to a charge that fair value was not paid." In support of this argument, petitioners point out that "good faith" is not incorporated into Section 3(18)(A)'s definition of "adequate consideration" with respect to securities for which there is a generally recognized market: "[i]f the securities in question had been listed on the New York Stock Exchange, and the fiduciaries had paid the price prevailing on that exchange, no one would seriously contend that adequate consideration had not been paid * * * even if the fiduciaries had acted imprudently in buying such securities." Pet. 13. From this, petitioners conclude that just as Congress intended the "adequate consideration" inquiry with respect to marketable securities to be concentrated on the value paid, not on the conduct of the fiduciary, Congress intended no more with respect to securities for which there is no readily ascertainable market price.

This construction of the statute is, as the court of appeals found, illogical and contrary to the purposes of the Act. It is precisely because the value of closely-held stock is not easily or readily ascertainable that the conduct of the fiduciaries in determining its value is crucial to the determination whether fair market value was assessed in good faith by the fiduciaries. The court of appeals properly recognized that to assure that fiduciaries do not pay more than "adequate consideration" in these circumstances, more than a belief in the

propriety of their own decisionmaking is required. Holding that "subjective good faith — a pure heart and an empty head — are not enough" (Pet. App. 23a), the court concluded as a matter of law that (*id.* at 24a (footnotes omitted)):

> [T]he ESOP fiduciaries will carry their burden to prove that adequate consideration was paid by showing that they arrived at their determination of fair market value by way of a prudent investigation in the circumstances then prevailing.[5]

Accordingly, the prudence test of Section 404 and the good faith test of Section 3(18)(B) are, under the circumstances of this case, interchangeable, since that is the only means by which ESOP participants can be protected against dilution of plan assets and plan fiduciaries protected against liability for honest miscalculations as to value.[6]

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[5]While applying the standard differently, the district court held a similar view of the "good faith" requirement: "good faith [entails] not only the sole motivation of benefiting the ESOP but also the application of sound business principles of evaluation" (Pet. App. 60a).

Petitioners repeatedly point out (Pet. 4, 7 & n.1, 8) that this is a case of first impression — in itself a factor sufficient to warrant denial of the petition. We would note, however, that subsequent to the filing of the petition in this case, the Tax Court endorsed the same approach as that taken by the court below. In *Capital City Excavating Co.* v. *Commissioner*, 47 T.C.M. (CCH) 1527, 1530 (Apr. 18, 1984), the court held that "[a]dequate consideration, as defined [in Section 3(18)(B)], requires not only that the purchase *price* reflect fair market value, but also that the *process* by which the price was set conform to established standards of fiduciary care." In *Capital City*, the court found that the fiduciary had followed a proper process to arrive at value; here, by contrast, petitioners did not.

[6]Petitioners contend (Pet. 20) that the court of appeals' decision will discourage the establishment of ESOPs and create uncertainty for fiduciaries. As the court of appeals pointed out, however, "[a] court reviewing the adequacy of consideration under Section 3(18) is to ask if the price paid is 'the fair market value of the asset *as determined in good faith by the . . . fiduciary*;' it is not to redetermine the appropriate amount for itself *de novo*" (Pet. App. 23a).

The court of appeals' holding regarding the standard of conduct required under Section 3(18)(B) was rational, and absent clear legislative history or conflicting appellate decisions to the contrary, it does not warrant review by this Court.[7]

3. In support of their substantive argument that the prudence standard should not be utilized to determine whether adequate consideration was paid, petitioners further contend (Pet. 15-18) that the court of appeals improperly shifted to them the burden of proof on the prudence question, which, under Section 404, rests on the Secretary. Petitioners concede, however, that they "have the [Section 408] burden of showing that they caused the ESOP to pay no more than 'adequate consideration' in the purchase of MCS stock" (Pet. 17). See *Marshall* v. *Snyder*, 572 F.2d

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[7]The court of appeals characterized the legislative history of ERISA as "contain[ing] no more than passing reference to the adequate consideration provision" (Pet. App. 20a). Petitioners nevertheless glean from this sparse history an express intent not to incorporate the prudent investor test into the Section 3(18)(B) definition (Pet. 11-13). As noted by petitioners, the Senate believed that the House version of "adequate consideration" was not strong enough, and the conferees adopted the Senate view on this issue. 120 Cong. Rec. 29932 (1974) (statement of Sen. Williams introducing the Conference Report). In light of this history, it is more likely that the conferees omitted the explicit reference to the prudence standard from Section 3(18)(B) because, as the Senate Report states, "it is emphasized * * * that even with respect to the transactions expressly allowed, the fiduciary's conduct must be consistent with the prudent man standards," S. Rep. 93-127, 93d Cong., 1st Sess. 31 (1973), than that they thought the standard inapplicable. Also instructive is the following statement in the Conference Report (H.R. Rep. 93-1280, 93d Cong., 2d Sess. 307 (1974)):

> Under the labor provisions a fiduciary will be liable for losses to a plan from a prohibited transaction in which he engaged if he would have known the transaction involving the particular party-in-interest was prohibited if he had acted as a prudent man. The type of investigation that will be needed to satisfy the test of prudence will depend upon the particular facts and circumstances of the case.

894, 900 (2d Cir. 1978). This allocation, as the court below stated (Pet. App. 24a n.27), is consistent with this Court's observation in a different context that the burden of proof should be placed upon the party who seeks to bring his conduct within a statutory exception to a broad remedial scheme. *SEC* v. *Ralston Purina Co.*, 346 U.S. 119, 126 (1953). Having determined that a prudent investigation is an essential element of the "good faith" showing necessary to establish that adequate consideration has been paid for an asset for which there is no generally recognized market, the court of appeals was correct to place the burden of proof for that element of the Section 408 exception, as for all others, on petitioners.

In any event, as stated, a Section 404 violation has been established in this case. While petitioners appear to suggest (Pet. 15-18) that the Secretary failed to meet his Section 404 burden of showing imprudence, there is nothing in the decision to indicate that the court relieved the Secretary of his burden under Section 404; and certainly, as we now show, there was abundant factual support for the court's finding of a Section 404, as well as a Section 406, violation.

4. Applying the "prudent investigation" standard to petitioners' conduct, the court of appeals found that they had breached their duty to act prudently — and therefore in good faith — in at least two respects. First, petitioners placed undue reliance upon the independent appraisal of $200 per share made by Rotan Mosle 13 and 20 months prior to the stock purchases, respectively, and upon their personal assessments of the company's financial prospects. The Rotan Mosle appraisal was based in part on a projection that MCS revenues would increase from $4.2 million in fiscal 1975 to $6.5 million the following year, and that this annual growth rate would continue indefinitely. The reality was far different: revenues actually declined in 1976, and by the time of the second ESOP transaction in February

1977, the 1977 revenues were still considerably less than the Rotan Mosle projections for 1976. Even though petitioners were entitled to consider information available to them by virtue of their positions as company insiders with respect to certain contracts expected to come "on stream" in the next year,[8] prudent fiduciaries would have questioned whether continued reliance on the Rotan Mosle appraisal was warranted in view of the fact that the underlying assumption of continued annual growth had proved exceedingly optimistic.

Second, the establishment of the ESOP itself represented a significant change in the underlying assumptions of the Rotan Mosle appraisal. Rotan Mosle had not assumed that an ESOP existed when it appraised the MCS stock. Yet, the ESOP constituted a significant cash drain upon the company's financial resources. As the court of appeals explained (Pet. App. 33a):

> Thus, at the time of the first ESOP transaction, it was [petitioners'] intent to cause MCS to transfer $2,020,000 of its earnings within a relatively short period of time (10,100 shares X $200). By the time of the second ESOP transaction, an additional 9,000 shares of MCS stock were outstanding due to the purchase of Metro, * * * so that a total of $3,820,000 (19,100 X $200) would be required to fully fund the ESOP's purchase of MCS. More, by leveraging the second transaction,

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[8] In fact, several significant new contracts were obtained during fiscal year 1978, and in that year MCS collected revenues of approximately $12.6 million. As the court of appeals found (Pet. App. 31a n.32), $4 million of that sum was attributable to a contract acquired through a series of transactions with Metro, another Cunningham company, and probably should not be counted in comparing the actual figures with the Rotan Mosle projections. But even if the $4 million is counted, the $12.6 million in 1978 revenues was considerably less than the $15.5 million anticipated by Rotan Mosle for that fiscal year.

> [petitioners] rendered MCS's ESOP contributions no longer entirely discretionary — the company became obligated to contribute at least $1 million to the ESOP to amortize the loan from Allied Bank.

The effect of these obligations upon the financial condition of the company should have been taken into account by prudent fiduciaries, but it was not. See *Eaves* v. *Penn*, *supra*.[9]

The court of appeals thus concluded that, by placing unduly heavy reliance on the obsolete and incomplete appraisal, petitioners had both overestimated the financial condition of MCS, whose stock they were purchasing, and underestimated the outstanding claims upon it. They did not, accordingly, satisfy their burden on the adequate consideration question. Pet. App. 39a. The unmistakable implication of this holding, of course, is that the $200 per share purchase price for the MCS stock was excessive, although by how much was not determinable by the court of appeals. The task left to the district court on remand is to determine "the appropriate relief to be afforded the Secretary" (*id.* at 42a).[10]

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[9]The twin factors of MCS's revenue shortfall and financial obligation to contribute to the ESOP were legally sufficient grounds for the court of appeals to conclude that petitioners breached their fiduciary duties. The court's decision, however, touched upon an additional reason why the $200 per share paid for the MCS stock could be found to be excessive. The understanding at the time of the ESOP transactions was that MCS would repurchase all stock distributed to terminating plan participants. A "put" obligation of this nature could represent another potentially significant cash drain on the company. See Pet. App. 35a n.35. Alternatively, if no such "put" obligation was legally created, a discount should have been applied to the block of stock purchased by the ESOP by virtue of its relative lack of marketability.

[10]The question of remedy may be affected by the fact that there has been a private settlement between the MCS ESOP beneficiaries and petitioners. See Pet. App. 7a-9a. Based on this settlement, petitioners

In sum, under the circumstances of this case, inquiry into whether petitioners paid more than adequate consideration necessarily carried with it inquiry into whether they conducted a prudent investigation. Had petitioners taken into account the factors that the court of appeals found they imprudently ignored, or had they obtained an appraisal of the MCS stock that was up-to-date at the time of the ESOP transactions, the price paid for the MCS stock clearly would have been less than $200 per share. To hold ESOP fiduciaries to this "prudent investigation" standard of conduct conflicts with neither the purposes of ERISA nor any court decision. Contrary to petitioners' unfounded assertion (Pet. 8), therefore, failure by this Court to review the decision below will not have "a profound impact upon the viability of employee stock ownership plans in closely-held companies."[11]

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argued to the court of appeals that any claims for monetary relief on behalf of the ESOP participants are barred by res judicata. The Secretary responded that the equitable remedies of disgorgement or constructive trust are available to the government, even if any payments to the ESOP participants would be barred. In addition, the Secretary's complaint included a prayer for injunctive relief that is not affected by the private settlement. See Pet. App. 9a-13a. In any event, the issue of appropriate relief must be addressed by the district court in the first instance.

[11]In a similar vein, petitioners argue (Pet. 18) that review by this Court is necessary to create an "incentive" for the Secretary to issue regulations under Section 3(18)(B). In the circumstances of this case, however, the absence of regulations is wholly immaterial because petitioners' conduct clearly violated the statute itself. Indeed, any regulations that the Secretary might promulgate would almost certainly be more restrictive in spelling out prohibited practices by fiduciaries, thereby providing petitioners and other pension plan trustees with less flexibility than they now enjoy. In any event, this Court should not grant certiorari simply for the purpose of providing the Secretary with an "incentive" to promulgate regulations that are unnecessary for the proper resolution of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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